IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-452

OCEAN GROVE CAMP MEETING ASSOCIATION OF THE UNITED METHODIST CHURCH,

Petitioner,

vs.

LOUIS J. CELMER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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The Petitioner, Ocean Grove Camp Meeting Association of the United Methodist Church, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey, entered in this proceeding on June 21, 1979.

Opinions Below

The opinion of the Supreme Court of the State of New Jersey is reported at 80 N.J. 405, —— A.2d —— (1979) and is submitted herewith as Appendix B (pp. 7a-22a).

The opinion of the Superior Court of New Jersey, Appellate Division is reported at 157 N.J. Super. 242, 384 A. 2d 894 (1978) and is submitted herewith as Appendix C (pp. 23a-32a).

The opinion of the Monmouth County Court is reported at 143 N.J. Super. 371, 362 A. 2d 330 (1976) and is submitted herewith as Appendix D (pp. 33a-40a).

Jurisdiction

In an opinion bearing date of June 21, 1979 the Supreme Court of New Jersey held invalid N.J.S.A. 40:97-1 *et seq.* —statutes which grant various municipal powers to any camp meeting association incorporated under the laws of New Jersey, including the Ocean Grove Camp Meeting Association of the United Methodist Church ("Ocean Grove")—on the ground that they violated the First and Fourteenth Amendments to the United States Constitution and Article I, Paragraph 4 of the New Jersey State Constitution.* Under State court practice, the opinion of

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* While the Supreme Court adverted, without substantial discussion or citation, to the Establishment Clause of the State Constitution, N. J. Const. (1947), Art. I, ¶4 (80 N.J. at 417), that Court's conclusion of unconstitutionality was supported by reference to cases of this Court applying and interpreting solely the Establishment Clause of the Federal Constitution (*id.* at 413-418).

(Footnote continued on following page)

the Supreme Court operates as a judgment. Orders, denying the motion of appellant Ocean Grove for a rehearing, and granting its motion for a stay of the judgment of the Supreme Court of New Jersey until October 1, 1979, were entered on July 10, 1979 (Appendix E, p. 41a).

The jurisdiction of the Supreme Court of the United States to review this decision is conferred by 28 U.S.C. 1257(3) which provides that final judgments of the highest court of a state may be reviewed by writ of *certiorari,* where the validity of a State statute is drawn in question on the ground of its being repugnant to the federal Constitution.

Question Presented

Does a legislative scheme for local government, over a century old, giving municipal police and other powers to a camp meeting association, including the power to appoint a Municipal Court Judge, constitute a violation of the Establishment Clause?

(Footnote continued from preceding page)

The Supreme Court of this state has consistently held that the state constitutional provision concerning the establishment of religion is "less pervasive" than the federal provision and has thus refrained from analyzing challenged statutes under the state constitutional provision. *Resnick* v. *E. Brunswick Tp. Bd. of Ed.*, 77 N.J. 88, 104, 389 A.2d 944 (1978); *Clayton* v. *Kervick*, 56 N.J. 523, 528, 267 A.2d 503 (1970), vac. 403 U.S. 945, 91 S.Ct. 2274, 29 L.Ed. 2d 854 (1971). In view of these latter decisions, and the *Celmer* court's mode of analysis, it is apparent that application of the New Jersey Constitution could not have constituted an independent ground of the decision in issue.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved, United States Constitution, Amendments I and XIV and New Jersey Constitution (1947) Art. I, Paragraph 4, are set forth in Appendix A (p. 1a). The statutory provisions involved, N.J. Stat. Ann. 40:97-1, -2, -3, -4, -5, -6, -7 and 8 and N.J. Stat. Ann. 40:99-1 are also set forth in Appendix A (pp. 1a-6a).

Statement of the Case

This is a Petition for Certiorari by the Ocean Grove Camp Meeting Association of the United Methodist Church ("Ocean Grove") from a judgment of the Supreme Court of New Jersey entered on June 21, 1979 holding invalid, under the federal and New Jersey State Constitution, N.J.S.A. 40:97-1 *et seq.* The other parties are the State of New Jersey and the defendant, Louis J. Celmer, Jr.

On May 3, 1976, Celmer was convicted of driving under the influence of alcohol in violation of N.J.S.A. 39:4-50(a), speeding N.J.S.A. 39:4-98 and disregard of a traffic signal N.J.S.A. 39:4-81 before the Municipal Court of Ocean Grove (Appendix F, pp. 42a-43a). Defendant appealed these convictions to the Monmouth County Court.* At a trial *de novo* in that Court based upon the record below, Celmer raised for the first time his contention that N.J. S.A. 40:97-1 *et seq.* are unconstitutional. These statutes confer upon camp meeting associations certain powers enabling them to act as a municipality in certain respects, including the power to establish a municipal court. Cf. *State* v. *Celmer, supra,* 143 N.J. Super. 371, 372-373, 362 A.2d 1330, 1330-1333 (1976). The County Court's opinion, rendered on July 12, 1976, concluded that the Ocean Grove Municipal Court was not lawfully established and was thus without jurisdiction to decide cases (Appendix D). Judgment of acquittal was entered on July 14, 1976 (Appendix G, pp. 44a-45a).

* The appeal was taken pursuant to New Jersey Rule of Court R. 3:23-1, 3:23-2, amended effective December, 1978 to provide for appeal as of right to the Superior Court, Law Division from a final judgment of a municipal court.

Subsequently the State filed timely notice of appeal to the Appellate Division (Appendix H, pp. 46a-47a), and Ocean Grove requested and was granted permission to intervene. The Appellate Division reversed the County Court's decision holding that the Ocean Grove Municipal Court was validly established, *State* v. *Celmer, supra,* 157 N.J. Super. 242, 384 A.2d 894. On December 19, 1978, the Supreme Court granted Defendant's petition for certification. 79 N.J. 464 (1978). The Supreme Court, reversing the decision of the Appellate Division, held that N.J.S.A. 40:97-1 *et seq.* violated the Establishment Clause, and hence, was invalid. *State* v. *Celmer, supra,* 80 N.J. 405, —— A.2d ——.

REASON FOR GRANTING THE WRIT

The Supreme Court of New Jersey erroneously applied the standards enunciated in *Lemon* v. *Kurtzman* in determining that N.J.S.A. 40:97-1 *et seq.* violates the Establishment Clause, particularly in the light of the presumption of validity which attaches to that statute.

Ocean Grove itself, a small (half-mile square) area surrounded on three sides by water, and untraversed by highways, is a community of unusual historical and cultural significance. For over a century there has developed in the small locality of Ocean Grove:

> ". . . a unique way of life within a spiritual and cultural enclave which has been resorted to by many thousands of people over the generations. Ocean Grove's repute in this regard is nationwide. The New Jersey Department of Environmental Protection is planning to nominate Ocean Grove to the National Register of Historic Places. Speakers at the Ocean Grove Auditorium have included Presidents Grant, Garfield, McKinley, Theodore Roosevelt, Taft and Wilson and many other distinguished persons. . . . Performing artists like Mme. Galli-Curci, Enrico Caruso, Walter Damrosch, Mme. Schumann-Heink, Emma Eames, Arthur Pryor, Louise Homer, David Bispham, Alma Gluck, Albert Spalding, Fritz Kreisler and Mischa Elman were all heard there. . . ." (*Schaad* v. *Ocean Grove Camp Meeting Association*, 72 N.J. 237, 257, fn. 9, 370 A. 2d 449, 470 (1977).)

Approximately two years before its decision in *State* v. *Celmer,* namely, on February 10, 1977, the Supreme Court

of New Jersey, in a carefully reasoned opinion, decided that the statutory grant of certain municipal powers to the Ocean Grove Camp Meeting Association (N.J.S.A. 40:97-1 *et seq.*), which has long sustained this unique way of life, did not violate the Establishment Clause of the United States Constitution. *Schaad* v. *Ocean Grove Camp Meeting Association, supra,* 72 N.J. 237, 370 A.2d 449. However, in that opinion the Court expressly stated that it took no position on the validity of the Ocean Grove Municipal Court. 72 N.J. at 252, 370 A.2d at 457, Footnote 5. Then approximately two years later, the same Court, addressing the same statutes and the same constitutional issue, reached a contrary conclusion as to the constitutionality of these statutes, in the case whose review we seek here. The Court unanimously overruled its prior decision, to the extent it was inconsistent.

In so holding *Celmer* erroneously applied the standards set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971), and deviated from the principles of other decisions of this Court from which the *Lemon* criteria are distilled. Moreover, the Supreme Court disregarded the long existence of the governmental scheme in issue, and failed to apply the strong presumption of validity which thus attaches to it.

A. The strong presumption of validity supporting N.J.S.A. 40:97-1.

It is established that long acquiescence in a statute or a governmental practice is supportive of the statute and the practice as against an establishment attack. Chief Justice Burger, in *Walz* v. *Tax Commission,* 397 U.S. 664, 678, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970), quoted Justice Holmes' dictum:

> "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackson* v. *Rosenbaum,* 260 U.S. 22, 31, 43 S. Ct. 9, 67 L. Ed. 107 (1922).

The applicability of that principle here cannot be disputed, and, indeed, was not challenged by our Supreme Court in this case.

The legislation struck down by our Supreme Court in this case was first enacted in 1870, soon after the settlement of Ocean Grove by a small band of Methodist clergymen. *State* v. *Celmer, supra,* 80 N.J. at 410, —— A.2d ——. In that year a Camp Meeting Association which had been previously founded by certain settlors was incorporated by an act of the Legislature of New Jersey under the name "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church". L. 1870, c. 157. Within a short period of time the Ocean Grove Camp Grounds were transformed from a sparsely settled expanse into a thriving community, in contrast with the undeveloped surrounding areas.* The Legislature in that Act, L. 1870, c. 157, also delegated rudimentary police and governmental powers to the Trustees of the Association. A local police court of Ocean Grove was established under L. 1876, c. 149 §2, and a Police Justice appointed in 1876, *State* v. *Celmer, supra,* 157 N.J. Super. at 248-249, 384 Atl. 2d at 897-898 (1978). This is over a century ago.

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* *Schaad* v. *Ocean Grove Camp Meeting Association, supra,* 72 N.J. at 255, 370 A.2d at 458; *State* v. *Celmer, supra,* 80 N.J. at 410 —— A.2d —— (1979). See further Gibbons, *History of Ocean Grove* (1939), p. 9-11, cited in *State* v. *Celmer* at loc. cited.

In 1894, Ocean Grove's basic powers were consolidated and expanded into a general police power statute applicable to "any camp meeting association or other corporation heretofore or hereafter incorporated under the laws of this state for the purpose of providing any religious body or society with a permanent camp meeting ground or place for religious service . . ." L. 1894, c. 90 (N.J.S.A. 40:97-1 *et seq.*). The nine sections of that statute specify various regulatory and police powers, secular in nature, directed toward the good order, health and welfare of a small municipality.

The statutory scheme for a local court is also of long standing. Ocean Grove originally established a local police court under the authority of a Police Justice pursuant to L. 1876, c. 149, §2.* The statute gave the Association the power to appoint Police Justices with "all the powers and jurisdiction in criminal cases which police justices now are or hereafter may be authorized to exercise within any town or city in this state . . ." This local police court was continued in its authority through successive legislation to the Municipal Court of Ocean Grove as now provided for in N.J.S.A. 40:97-4 and N.J.S.A. 2A:8-1. As the Appellate Division stated in *State* v. *Celmer, supra,* 157 N.J. Super. at 249, 384 A.2d at 898 (a point unchallenged by our Supreme Court in reversing that decision):

> "The transition from police court to municipal court was in name only . . . The Ocean Grove Municipal Court has existed almost contemporaneously with the governing body established in 1870 and declared valid by the Supreme Court in *Schaad,*" [72 N.J. 237, 370 A.2d 449 (1977), *supra.*]

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* (Rev. 1877, §36; C.S. p. 355, §2; R.S. 40:99-2.)

Not only is the legislative scheme involved here long in existence (see pp. 5 to 6 *supra*), but it has enjoyed long public acceptance and acquiescence. The statutory scheme generally was challenged only once prior to *Schaad* in 1924, in *Percello* v. *Ocean Grove Camp Meeting Association,* 2 N.J. Misc. 124, 126 A. 553 (Sup. Ct.), *aff'd. o.b.* 100 N.J.L. 407, 126 A. 533 (E. & A. 1924), and then without success. (See discussion in *Schaad* v. *Ocean Grove Camp Meeting Association, supra,* 72 N.J. at 265-267, 370 A.2d at 464-465 (1977)). The Ocean Grove Court, which has existed from L. 1876, c. 149 for 103 years, has not once before been subject to constitutional challenge.

The question whether N.J.S.A. 40:97-1 *et seq.* satisfies the Establishment Clause, under the relevant standards enunciated by this Court, must thus be approached in the light of the century-old acceptance which the statute has had, and the corresponding presumption of validity in its favor.

B. Our Supreme Court's misapplication of the *Lemon* standard.

Criteria for the validity of legislation under the Establishment Clause are set forth in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612-613, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745 (1971), as follows:

> "Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster 'an excessive government entanglement with religion'."

Our Supreme Court held N.J.S.A. 40:97-1 *et seq.* invalid essentially because the internal by-laws of the Association,

to which police powers are delegated by the statute, foster religious purposes. *State* v. *Celmer, supra,* 80 N.J. at 416-417, A.2d . But it is the *statute* whose validity is in question here. And as the Court pointed out in *Schaad* v. *Ocean Grove Camp Meeting Association, supra,* 72 N.J. at 260, n. 10, 370 A.2d at 461:

> "Nowhere does this legislation impose religious or other qualifications for officers or trustees of the kind of camp meeting association designated therein. Bylaws and ordinances have the force of law 'when not inconsistent with the constitution and laws of this state.' N.J.S.A. 40:97-6."

The Supreme Court in *State* v. *Celmer* failed to consider the historical secular purpose of the statute painstakingly set forth in *Schaad* v. *Ocean Grove Camp Meeting Association, supra,* 72 N.J. at 257-258, 370 A.2d at 459-460; namely, that it was *"functionally"* appropriate in a purely secular sense to vest primary police powers in the association" (emphasis by the Court) since Ocean Grove is "geographically tucked away from bordering Neptune Township, as a whole," and has had a separate and distinct community life, characterized by camp meeting which entail "logistic and order—maintenance requirements . . . peculiar to itself . . ." The Supreme Court in *Celmer,* also read out of the *Lemon* test the requirement that the advancement of religion must be the *primary* effect of a statute to render it unconstitutional. It is apparent that the *principal* effect of N.J.S.A. 40:97-1 *et seq.* is to create a mechanism for purely secular regulation (concerning, e.g., maintenance of sewers, licensing of merchants, laying of streets).* *A fortiori,* see the Sunday closing law

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* Nowhere in its opinion does the Supreme Court say that the statute is other than religiously neutral with respect to the specific police powers delegated to the Association.

cases decided by this Court, e.g., *McGowan* v. *Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961). And see *Everson* v. *Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1974), and *Walz* v. *Tax Commission, supra,* 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697.

As to the test of "excessive government entanglement with religion," we note that Justices White and Rehnquist regard it as adding nothing to the "principal effect" test. *Roemer* v. *Maryland Public Works Bd.,* 426 U.S. 736, 767-770, 96 S. Ct. 2337, 2355-2356, 49 L. Ed. 2d 179, 200-201 (1976). In any event, nowhere in its opinion did our Supreme Court consider whether the statutes had the earmarks of "excessive entanglement" suggested by this Court in *Lemon, supra,* 403 U.S. at 615, 617, 619-620, 622; 91 S. Ct., 29 L. Ed. 2d 745 and *Roemer, supra,* 426 U.S. at 761-767, 96 S. Ct. at 2352-2354, 49 L. Ed. 2d 196-199—that is, nowhere does the Court hold that the statute requires substantial government surveillance of a religious institution, or that the state activity creates a danger of political fragmentation on religious lines. Nor could the Court have found those factors present here. See *Schaad, supra,* 72 N.J. at 263-264, 370 A.2d at 463.

In short, the Supreme Court failed entirely to subject this legislation itself to analysis in the light of the factual circumstances in which it arose and now operates and in the light of the relevant criteria adopted by this Court. For this reason, and because the Supreme Court's decision threatens to destroy the way of life of a community whose preservation is in the public interest, we respectfully request that this Court review the decision of the court below.

CONCLUSION

For the reasons noted above, a writ of *certiorari* should issue to the Supreme Court of New Jerey.

Respectfully submitted,

ALFRED C. CLAPP,
Counsel for Petitioner,

APPENDIX A

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Constitution, Art. I, ¶4

There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.

N.J. Stat. Ann. §40:97-1

Streets, sewers and drains; parks; establishment and regulation

The board of trustees, directors or managers of any camp meeting association or other corporation heretofore

or hereafter incorporated under the laws of this state for the purpose of providing any religious body or society with a permanent camp meeting ground or place for religious service, in addition to all the rights and powers heretofore granted, may open, lay out, maintain and vacate streets, drives, avenues and walks, lay out, maintain and beautify parks and open places, and construct and maintain sewers and drains within the limits of lands or grounds owned or controlled by such association or corporation by authority of law, with full authority to regulate the use of such sewers and drains, and prescribe and fix the terms, times and manner in which such streets, drives, avenues and walks may be used, and license and prohibit the use of drays, carts, carriages and all manner of vehicles thereon.

N.J. Stat. Ann. §40:97-2

Authority over streets, walks and parks previously laid out

In all cases in which streets, drives, avenues, walks, parks or open places have been opened and laid out by any such association or corporation, over and upon lands owned by such association or corporation and to which such association or corporation still retains the title, the trustees, directors or managers thereof shall, subject to any rights which may have been granted therein by contract, have, possess and exercise all the power and authority herein granted over streets, drives, avenues, walks, parks and open spaces to be hereafter opened or laid out.

N.J. Stat. Ann. § 40:97-3

Railways and railroads in streets; opening of streets; consent required

No person shall without the consent of a majority of all the trustees, directors or managers of any such association or corporation, construct or operate within the limits of the ground owned and controlled by such association or corporation under authority of law, any street railway or other railroad, nor shall any public highway or thoroughfare be opened or constructed over, into or across the same without like consent.

N.J. Stat. Ann. § 40:97-4

Preservation of order; abatement and prohibition of nuisances; protection of public health; municipal courts

The trustees, directors or managers of every such association or corporation shall, within the limits of the lands owned or controlled by it, have exclusive jurisdiction to maintain and preserve order, abate and prohibit nuisances detrimental to the public health, and make and enforce rules and regulations to promote and protect the public health. They may establish, by ordinance or ordinances, a municipal court in the same manner as in municipalities, which shall possess, within such limits, the jurisdiction, functions, powers and duties that may be given to municipalities by law. As amended L.1953, c. 37, p. 741, § 274, eff. March 19, 1953.

Appendix A

N.J. Stat. Ann. §40:97-5

By-laws, regulations, ordinances and resolutions; passage; publication

The powers and authority hereby conferred upon such trustees, directors and managers of every such association or corporation shall be used and exercised by making and publishing in the manner hereinafter directed, by-laws and regulations, and by the passage of appropriate ordinances and resolutions. All such by-laws, regulations, ordinances or resolutions shall receive the affirmative vote at a regular meeting of a majority of all the trustees, directors or managers of such association or corporation, and shall be entered at length in a journal or minutes of such body. Before any such by-laws, ordinances or regulations shall become operative a copy thereof certified by the presiding officer of such body and the secretary thereof shall be set up for the space of five days in five of the most public places within the limits of the territory owned or controlled as aforesaid by such corporation or association.

N.J. Stat. Ann. §40:97-6

By-laws, regulations, ordinances and resolutions; force and effect

All rules, by-laws, regulations, ordinances and resolutions made and passed as hereinbefore provided shall have the force and effect of laws when not inconsistent with the constitution and laws of this state.

Appendix A

N.J. Stat. Ann. §40:97-7

Ordinances; penalties for violations

Every such board of trustees, directors or managers may fix and prescribe penalties for the violation of any ordinance, rule, regulation or by-law which may be lawfully passed by said board of trustees or other governing body of any such association for any purpose.

N.J. Stat. Ann. §40:97-8

Ordinances; enforcement; evidence

Any ordinance, rule, regulation or by-law which shall have been lawfully passed by said board for any purpose shall be enforceable in the same manner and in the same courts as municipal ordinances.

A copy of the ordinance or section of the ordinance, rule, regulation or by-law alleged to have been violated, certified under the hand of the secretary or clerk of the board, shall be taken as full and legal proof of the existence of such ordinance, rule, regulation or by-law, and that all the requirements of law in addition to the ordaining, publishing and making thereof so as to make the same legal and binding have been complied with, unless the contrary be shown. As amended L.1953, c. 37, p. 741, § 275, eff. March 19, 1953.

N.J. Stat. Ann. §40:99-1

Peace officers for camp grounds; appointment, powers, duties, and term

The Governor, upon the application in writing of the board of trustees of any camp meeting association duly

Appendix A

incorporated under the laws of this State or of any other incorporated association for the maintenance of public worship in the open air, may commission one or more persons whom such trustees shall designate and request, not exceeding six in number, as peace officers, for the purpose of keeping order on the camp grounds and premises of such incorporated association. Such officers shall have, when on duty, the same power, authority and immunities which constables and other peace officers under the laws of this State possess and enjoy, and shall hold their offices from year to year. They shall also have power to enforce obedience, on said grounds and premises, to any rule or regulation of said trustees for the preservation of quiet and good order, and also to enforce the provisions of chapter one hundred seventy-one of Title 2A of the New Jersey Statutes,[1] and to arrest for the commission of any crime in all respects. As amended L.1953, c. 37, p. 742, § 276, eff. March 19, 1953.

[1] Section 2A:171-1 et seq.

APPENDIX B

Opinion of New Jersey Supreme Court

SUPREME COURT OF NEW JERSEY

No. 14-616

STATE OF NEW JERSEY,

Plaintiff-Respondent,

and

OCEAN GROVE CAMP MEETING ASSOCIATION OF THE UNITED METHODIST CHURCH,

Intervenor-Respondent,

v.

LOUIS J. CELMER, JR.,

Defendant-Appellant.

Argued March 6, 1979—Decided June 21, 1979.

The opinion of the court was delivered by

PASHMAN, J. At issue in this case is the constitutionality of N.J.S.A. 40:97-1 *et seq.*—a statutory scheme which grants various municipal powers to the Ocean Grove Camp Meeting Association of The United Methodist Church. Specifically, defendant contends that by dele-

gating to the Association the authority to make laws and the power to enforce those laws through the establishment of a municipal court, *see* N.J.S.A. 40:97-4 to 40:97-8, the Legislature has transcended the bounds of both the First and Fourteenth Amendments to the United States Constitution and Article 1, paragraph 4 of our own State Constitution.

On March 24, 1976 defendant Louis Celmer, Jr. was arrested by officers of the Ocean Grove Police Department and charged with driving while under the influence of alcohol (N.J.S.A. 39:4-50(a)); speeding (N.J.S.A. 39:4-98); and disregard of a traffic signal (N.J.S.A. 39:4-81). Following a trial in the Ocean Grove Municipal Court, defendant was found guilty of each of the three offenses.

Defendant appealed these convictions to the Monmouth County Court, *see* R. 3:23-1, -2[1]. In addition to attacking the sufficiency of the proofs upon which the findings of guilt were based, defendant contended that the statutory scheme permitting the formation of a municipal court in Ocean Grove, *see* N.J.S.A. 40:97-4, was invalid under the establishment of religion clause of the First Amendment, that the municipal court was therefore an improperly constituted tribunal, and that consequently his convictions must be reversed.

On June 11, 1976, following a trial *de novo* based upon the record below, *see* R. 3:23-8(a), the County Court concluded that defendant's guilt as to all three charges had

[1] This rule was amended effective December 1978 to provide for appeal as of right to the Superior Court, Law Division from a final judgment of a municipal court. See also, comments on R. 1:1-1 and R. 1:1A.

been proven beyond a reasonable doubt. Nevertheless, it reversed the speeding and disregard of a traffic signal convictions on the ground that these offenses merged into the drunk driving violation. Decision as to the merits of defendant's First Amendment claim was reserved, in order that notice of the constitutional challenge to be given to the Attorney General of New Jersey, the Ocean Grove Municipal Court, and the Ocean Grove Camp Meeting Association of the United Methodist Church, *see* R. 4:28-4. None of the foregoing parties chose to intervene at that time.

The County Court's decision as to defendant's constitutional claim was rendered on July 12, 1976. *State* v. *Celmer,* 143 N. J. Super. 371 (Cty. Ct. 1976). It concluded that N.J.S.A. 40:97-1 *et seq.* did indeed violate the dictates of the First Amendment, and that therefore the Ocean Grove municipal court was without jurisdiction to determine defendant's guilt or innocence of the charged offenses. 143 N. J. Super. at 377. The drunk driving conviction there imposed was consequently reversed and a judgment of acquittal entered.

On July 26, 1976 the State filed a notice of appeal to the Appellate Division. The Ocean Grove Camp Meeting Association requested and was granted permission to intervene. On March 10, 1978 the Appellate Division reversed the County Court's decision as to the constitutionality of N.J.S.A. 40:97-1 *et seq.* and reinstated the drunk driving conviction. *State* v. *Celmer,* 157 N. J. Super. 242 (App. Div. 1978). We granted defendant's petition for certification. 79 N. J. 464 (1979). We now reverse.

Appendix B

I

Resolution of defendant's constitutional challenge must begin with an examination of both the internal workings of the Ocean Grove Camp Meeting Association (Association) and the powers granted that Association by the Legislature in N.J.S.A. 40:97-1 *et seq.* In 1869, a small band of Methodist clergy led by Rev. William B. Osborn established a camp meeting ground upon 260 acres of land which now form the nucleus of Ocean Grove. The site quickly attracted adherents, and within a short period of time the area was transformed from a sparsely settled expanse into a thriving community of fellow worshippers. *See* Gibbons, *History of Ocean Grove,* 9-11 (1939).

In 1870 the association which these people had established was incorporated by State charter under the name "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church" L. 1870, c. 157. That name has since been changed to "The Ocean Grove Camp Meeting Association of The United Methodist Church" L. 1968, c. 231. At present, the lands owned by the corporation form a part of Neptune Township.

At the time it obtained its corporate charter, the Association adopted a set of by-laws to regulate the internal affairs of the organization. These by-laws make clear that the main purpose underlying the formation of the Association was, and remains today, that of

> provid[ing] and maintain[ing] for the members and friends of The United Methodist Church a proper, convenient and desirable permanent camp meeting ground and Christian seaside resort * * *. (Association By-Laws, Art. II)

Appendix B

See, L. 1870, c. 157, § 1.

In order that this goal be achieved, the Association retained title to all lands, streets, walks, parks, and other public places situated within the camp grounds. The property was, however, subdivided and individual lots leased for 99 years, renewable in perpetuity, to persons "who may be vouched for as of good moral character and in sympathy with the objects of [the] Association." Association By-Laws, Art. XI, § 1. Moreover, all transfers of lots were, and remain, subject to the approval of the Association's president or designated representative. *Id.*

The by-laws also established a governmental apparatus in order to manage the internal affairs of the community. As presently constituted, legislative and executive powers within the Association are reposed in a 26 member Board of Trustees. At least ten of these trustees must be ministers and ten, laymen. All, however, are required to "be and remain members of The United Methodist Church in good and regular standing." Association By-Laws, Art. III, § 1. This Board is self-perpetuating in that the trustees themselves select their replacements and successors. *Id.* Moreover, only the trustees can revise or amend the by-laws, and hence only they can alter the manner in which the present government is structured. *Id.*

The by-laws also provide for the election of "associate" trustees—persons who "have the privilege of attending [Board] meetings" but who cannot vote upon matters therein considered. *Id.,* Art. III, § 5. Associate trustees need not be adherents of the Methodist faith; they must, however, "be member[s] of a Christian Church in good and regular standing." *Id.*

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Responsibility for the day-to-day operation of the community has been delegated by the by-laws to those trustees who serve on the Board's executive, program and development committees. *Id.*, Art. V, § 2. The executive committee serves as the administrative arm of the Board, and represents the Board in all official matters. *Id.*, Art. VII. The program committee's main responsibility is that of organizing religious services and meetings for Ocean Grove's inhabitants. *Id.*, Art. VIII. The development committee is charged with the duty of initiating and implementing financial programs "necessary to provide and maintain [Ocean Grove as] * * * a proper, convenient and desirable permanent Camp Meeting Ground and Christian Seaside Resort." *Id.*, Art. IX, § 2.

Beginning with the Association's incorporation in 1870 and continuing to the present day, the Legislature has granted Ocean Grove's Board of Trustees various police powers ordinarily exercisable only by municipalities. *See* L. 1870, c. 157; L. 1878, c. 40; L. 1878, c. 76; L. 1881, c. 211; L. 1894, c. 90 as amended L. 1953, c. 37, § 274 (now codified at N.J.S.A. 40:97-1 *et seq.*). As now in effect, these statutes delegate to the Board responsibility for the construction and maintenance of public highways, streets, walks, parks, and sewers located within the boundaries of the camp grounds. N.J.S.A. 40:97-1, -2. The trustees also possess veto power over the construction of any public highway in Ocean Grove, or the implementation of public forms of transportation. N.J.S.A. 40:97-3. Finally, the trustees are given "exclusive jurisdiction" to "maintain and preserve order" within Ocean Grove and, in order to facilitate the achievement of that end, have been accorded the power to "make and enforce rules and regulations to promote and protect the public health,"

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N.J.S.A. 40:97-4, and to "prescribe penalties for [their] violation," N.J.S.A. 40:97-7. These rules, whether passed in the form of ordinances, by-laws or resolutions, may be enforced by a municipal court established by the trustees, N.J.S.A. 40:97-4, -5, -6, and are accorded by statute the same force and effect as municipal ordinances, N.J.S.A. 40:97-8.

The municipal court of Ocean Grove, as presently constituted, was established through an ordinance adopted by the Association's trustees on April 17, 1964. A court with similar powers has existed within the community since 1876. *See* L. 1876, c. 149, § 2. The magistrate of the court is appointed by the Board for a term of three years and until such time as a successor is appointed and qualified. It was this court that initially found defendant guilty of the charges which form the basis of the present suit. The trustees have also established an Ocean Grove Police Department in order to secure compliance with both the orders of that court and the "ordinances" enacted by the Board.

Defendant contends that the statutory scheme codified as N.J.S.A. 40:97-1 *et seq.* is violative of the First Amendment in that it cedes to a religious organization several governmental powers, including the power to make laws and the power to establish a municipal court in order to enforce compliance with those laws. Consequently, he maintains that the Ocean Grove Municipal Court—being established by a Board ordinance—is an improperly constituted tribunal and hence without jurisdiction to determine his guilt or innocence of the charged offenses. For the reasons to be given below, we conclude that defendant's contentions in this regard are meritorious.

II

[1, 2] The First and Fourteenth Amendments to the United States Constitution prohibit state legislatures from enacting any law "respecting an establishment of religion * * *."[2] As the Supreme Court has often noted, the framers' choice of the word "respecting" was not inadvertent. The authors of the federal constitution did not merely wish to preclude the actual "establishment" of a state church or a state creed; rather, they also sought to outlaw any enactment which might constitute "a step that could lead" to the unity of government and religion. *Lemon* v. *Kurtzman,* 403 U. S. 602, 612, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, 755 (1971); *see, e. g., Torcaso* v. *Watkins,* 367 U. S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961); *Everson* v. *Board of Education,* 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947). In the oft-quoted words of Thomas Jefferson, the First Amendment seeks to erect, as nearly as possible, "a wall of separation between Church and State." *See, e. g., Torcaso, supra,* 367 U. S. at 493, 81 S. Ct. at 1682, 6 L. Ed. 2d at 986; *Everson, supra,* 330 U. S. at 16, 67 S. Ct. at 511, 91 L. Ed. at 723.

The reasons which impelled the framers to incorporate the establishment clause into the Constitution have been detailed elsewhere, and need not here be repeated. *See, e. g., Everson, supra,* 330 U. S. at 8-15, 67 S. Ct. at 507-511, 91 L. Ed. at 719-723; *id.,* 330 U. S. at 28-48, 67 S. Ct.

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[2] The strictures of the First Amendment are applicable to states through the due process clause of the Fourteenth Amendment. *See, e.g., Cantwell* v. *Connecticut,* 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Everson* v. *Board of Education,* 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947).

at 517-527, 91 L. Ed. at 730-740 (Rutledge, J., dissenting); *McCollum* v. *Board of Education,* 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948). *See generally* L. Tribe, *American Constitutional Law* § 14-3 at 816-819 (1978). We merely note that complete separation of government and church was considered both "best for the state and best for religion." *McCollum, supra,* 333 U. S. at 232, 68 S. Ct. at 475, 92 L. Ed. at 669 (Frankfurter, J., concurring). The framers believed that individual religious liberty could be safeguarded only if government "was stripped of all power to tax, to support, or otherwise to assist any or all religions," *Everson, supra,* 330 U. S. at 11, 67 S. Ct. at 509, 91 L. Ed. at 721, and conversely that only by "rescu[ing] the temporal institutions from religious interference" could the civil liberties of the populace be preserved, *id.,* 330 U. S. at 15, 67 S. Ct. at 511, 91 L. Ed. at 723. *See* L. Tribe, *supra,* § 14-3 at 816-819.

In keeping with the intent underlying the adoption of the establishment clause, the Supreme Court has consistently emphasized that "active involvement of the sovereign in religious activity" cannot be tolerated. *Walz* v. *Tax Commission,* 397 U. S. 664, 668, 90 S. Ct. 1409, 1411, 25 L. Ed. 2d 697, 701 (1970); *see, e.g., Lemon, supra,* 403 U. S. at 612, 91 S. Ct. at 2111, 29 L. Ed. 2d at 755; *Resnick* v. *East Brunswick Tp. Bd. of Ed.,* 77 N. J. 88, 108 (1978). As Justice Black has forcefully noted:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.

> • • • No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* [*Everson, supra,* 330 U. S. at 15-16, 67 S. Ct. at 511-512, 91 L. Ed. at 723 (emphasis supplied)]

See, e. g., Torcaso, supra, 367 U.S. at 492-493, 81 S. Ct. at 1682, 6 L. Ed. 2d at 986. In its more recent opinions, the Court has characterized this latter requirement of the establishment clause as a prohibition of "excessive government entanglement with religion." *Walz, supra,* 397 U. S. at 674, 90 S. Ct. at 1414, 25 L. Ed. 2d at 704; *see, e. g., National Labor Relations Board* v. *Catholic Bishop of Chicago,* —— U. S. ——, ——, 99 S. Ct. 1313, 1319, 59 L. Ed. 2d 533, 542 (1979); *Lemon, supra,* 403 U. S. at 613, 91 S. Ct. at 2111, 29 L. Ed. 2d at 755; *Resnick* v. *East Brunswick Tp. Bd. of Ed., supra,* 77 N. J. at 114. *See generally* L. Tribe, *supra,* § 14-12 at 865-880.

[3] Regardless, however, of the precise phraseology that one utilizes to describe this First Amendment mandate, there can be no question but that at a minimum it precludes a state from ceding governmental powers to a religious organization. Yet, through the enactment of N.J.S.A. 40:97-1 *et seq.,* our Legislature has sought to do just that.

As detailed in Part I *ante,* the Ocean Grove Camp Meeting Association of the United Methodist Church is first and foremost a religious organization. Such a state of affairs

is not only evident from its name, but also from the purposes underlying its formation, its internal governmental structure, and the various activities which it undertakes.

The main goal sought to be achieved by the Association is that of providing and maintaining "for the members and friends of *The United Methodist Church*" a proper, convenient and desirable permanent "*camp meeting ground* and *Christian* seaside resort." Association By-Laws, Art. II (emphasis supplied). In order that this goal not be frustrated, only *Methodists* in good and regular standing can be selected to sit on the Board of Trustees—the Association's governing body. *Id.,* Art. III, § 1. At least ten of these trustees must be Methodist ministers. *Id.,* Art. III, § 1. Finally, two of the three Board committees responsible for the day-to-day functioning of the community deal exclusively with non-secular matters. The program committee organizes and oversees Ocean Grove's "religious services," *id.,* Art. VIII, § 2, while the development committee is charged with the duty of implementing financial programs necessary to maintain Ocean Grove's character as a "Christian" Seaside Resort. *Id.,* Art. IX, § 2.

Through the enactment of N.J.S.A. 40:97-1 *et seq.,* the Legislature has in effect transformed this religious organization into Ocean Grove's civil government. Methodist ministers and laymen have been granted responsibility for the construction and maintenance of *public* streets, walks, parks, and sewers. N.J.S.A. 40A:97-1, -2, -3. They have also been delegated the power to make laws applicable to all who might find themselves situated within the boundaries of the Camp Meeting grounds, to prescribe penalties for the violation of these laws, and to establish both a

police department and a municipal court in order to secure compliance with these laws. N.J.S.A. 40:97-4, -5, -6, -7, -8.

[4] In effect, the Legislature has decreed that in Ocean Grove the Church shall be the State and the State shall be the Church. Individuals chosen by the followers of a particular faith to safeguard their spiritual and cultural way of life have been accorded the authority to determine what shall constitute acceptable modes of conduct for Methodists and non-Methodists alike. Government and religion are so inextricably intertwined as to be inseparable from one another. Such a fusion of secular and ecclesiastical power not only violates both the letter and spirit of the First Amendment, it also runs afoul of the "establishment clause" of our own State constitution, *see N. J. Const.* (1947), Art. I, ¶4.

[5] Other constitutional infirmities are also manifest in the system of "government" presently existing in Ocean Grove. Art. I, paragraph 4 of the New Jersey Constitution prohibits the State from imposing a "religious . . . test . . . as a qualification for any office or public trust." The "free exercise" clause of the First Amendment has been interpreted to likewise forbid a state to condition public office upon an individual's religious beliefs. *See Torcaso* v. *Watkins,* 367 U. S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961). Through the enactment of N.J.S.A. 40:97-1 *et seq.*, however, the Legislature has ordained that non-Methodists cannot participate in governmental decisions relating to the management of Ocean Grove's secular affairs.

[6] For the foregoing reasons, N.J.S.A. 40:97-1 *et seq.* is hereby declared unconstitutional and of no force and effect. The Ocean Grove Camp Meeting Association of The United Methodist Church can be delegated neither the power to manage public highways or other public property, the power to make laws, nor the power to enforce Board rules through establishment of a police department and municipal court. These functions must henceforth be exercised by the governing body of Neptune Township, of which Ocean Grove forms a part.

To the extent that *Schaad* v. *Ocean Grove Camp Meeting Ass'n,* 72 N. J. 237, 250-270 (1977), *Percello* v. *Ocean Grove Camp Meeting Association,* 100 N. J. L. 407 (E & A 1924), and *McCran* v. *Ocean Grove,* 96 N. J. L. 158 (E & A 1921), are inconsistent with the foregoing, they are hereby overruled.

[7] The "municipal court" which initially tried and convicted defendant was established by an "ordinance" adopted by the Association's Board of Trustees on April 17, 1964. Its magistrate was appointed by this same Board. Consequently, that "court" is an improperly constituted tribunal and hence possessed no jurisdiction to determine defendant's guilt or innocence of the charged offenses. The convictions there obtained thus cannot stand.

[8, 9] This is not to say, however, that every judgment that has been entered in Ocean Grove's Municipal Court since its inception is void. We have long held that when a statute or ordinance creates an office or provides for an officer to carry out its functions, the acts of that officer undertaken in good faith and prior to a judicial declaration of nullity have the force and effect of law notwith-

standing a constitutional defect in the enabling legislation. *See, e.g., State* v. *Pillo*, 15 N. J. 99 (1954), *cert.* den. 348 U. S. 855, 75 S. Ct. 78, 99 L. Ed. 673 (1954); *Lang* v. *Bayonne*, 74 N. J. L. 455, 462 (E & A 1907). In the interim, the officer is an "officer *de facto*" and the actions he undertakes in that capacity retain their validity. *See Lang, supra*, 74 N. J. L. at 462. Therefore, matters which have been finally disposed of in Ocean Grove Municipal Court and are not presently pending judicial review cannot be relitigated, nor can entries of judgments pertaining thereto be collaterally attacked.

III

The question which remains is whether this case should be remanded for a new trial in Neptune Municipal Court, *see* R. 1:13-4(a), or whether a judgment of acquittal should be entered. The County Court judge concluded that a remand was foreclosed by N.J.S.A. 39:5-3. That statute provides in part:

> When a person has violated a provision of this subtitle, the magistrate may, *within 30 days after the commission of the offense,* issue process . . . for the appearance or arrest of the person so charged. * * * [emphasis supplied]

The County Court judge treated this provision as a statute of limitations. Since the charges against defendant were not filed with a court of competent jurisdiction within 30 days of the offense, he concluded that entry of a judgment of acquittal was mandated. 143 N. J. Super. at 377.

Whether N.J.S.A. 39:5-3 does indeed constitute a 30 day statute of limitations is a difficult question which we need not decide. For even assuming that its provisions do not bar a new trial, we have concluded that a remand of this case to the Neptune Township Municipal Court would violate the principle of "fundamental fairness." *See State* v. *Tropea*, 78 N. J. 309, 315-316 (1978); *cf. Rodriquez* v. *Rosenblatt*, 58 N. J. 281, 294 (1971).

[10] Defendant has already been tried once for his alleged offenses—albeit before an improperly constituted tribunal. He has thus been made to suffer, in the words of Justice Clifford, the "embarrassment, expense and anxiety . . . encountered by those faced with criminal prosecutions." *State* v. *Tropea, supra*, 78 N. J. at 316. More than three years have elapsed since the conduct which formed the basis of the charges against him was allegedly engaged in. It is therefore not unlikely that his ability to muster a defense has diminished. Finally, it is the State who, through the enactment of N.J.S.A. 40:97-1 *et seq.*, created a situation in which the improper tribunal could be established. Under these circumstances, "a rerun at the trial level would result in unwarranted harassment and should be avoided * * *." *State* v. *Tropea, supra*, 78 N. J. at 316.

IV

In closing, we wish to emphasize that our holding today should not be read as impugning the integrity of either the Association's Board of Trustees or the way of life it has sought to institutionalize in Ocean Grove. We have no doubt that the Board has worked long and hard to estab-

lish rules which it earnestly feels will best secure peace, happiness, and tranquility for the community's inhabitants. The administration of the camp grounds has earned the admiration of many citizens and public officials. Indeed, Ocean Grove is now enrolled in the National Registry of Historic Places.

This way of life need not be abandoned on account of today's decision. The Association may continue to adopt rules which it deems necessary to protect Ocean Grove's unique cultural and spiritual characteristics. The inhabitants of Ocean Grove—and indeed all others who so choose—remain free to voluntarily abide by those rules. The Board, however, cannot exercise essential governmental functions, make law or force compliance with its rules through the establishment of a municipal court and police department. These are functions which can be exercised only by the people as a whole.

Accordingly, the judgment of the Appellate Division is reversed, and this case remanded for entry of judgments of acquittal on all three charges.

For reversal—Chief Justice HUGHES and Justices MOUNTAIN, SULLIVAN, PASHMAN, CLIFFORD, SCHREIBER and HANDLER—7.

For affirmance—None.

APPENDIX C

Opinion of the Superior Court of New Jersey, Appellate Division

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

No. A 4236-75

STATE OF NEW JERSEY,

Plaintiff-Appellant,

and

OCEAN GROVE CAMP MEETING ASSOCIATION,

Intervenor,

v.

LOUIS CELMER, JR.,

Defendant-Respondent.

Argued November 22, 1977—Decided March 10, 1978.

The opinion of the court was delivered by

MATTHEWS, P. J. A. D. Defendant was convicted in the Municipal Court of Ocean Grove of driving under the influence of alcohol (N.J.S.A. 39:4-50(a)); speeding (N.J.S.A. 39:4-98), and disregarding a traffic signal (N.J.S.A.

39:4-81). After a trial *de novo* on the record below, the Monmouth County Court sustained the conviction for driving under the influence, but reversed the speeding and disregard of a traffic signal convictions on the ground that they merged into the drunk driving offense. However, defendant at the trial *de novo,* raised for the first time, the issue of lack of jurisdiction of the municipal court because the statute, N.J.S.A. 40:97-1 *et seq.,* granting powers to the Ocean Grove Camp Meeting Association (Ocean Grove) to establish a municipal court is unconstitutional. Thereafter, the County Court judge sustained defendant's argument and vacated his conviction finding that "[t]he Municipal Court of Ocean Grove, not being lawfully established, is without jurisdiction." *State* v. *Celmer,* 143 N. J. Super. 371, 377 (Cty. Ct. 1976).

The State argues that we should ignore the constitutional issue because the Ocean Grove Municipal Court had jurisdiction to decide these offenses on the theory of *de facto* jurisdiction and because no objection to the Ocean Grove Municipal Court's authority was raised in that court. The argument is based principally on the decision of the former Court of Errors and Appeals in *Lang* v. *Bayonne,* 74 N. J. L. 455 (1907). *Lang* involved the efforts of a police officer to gain reinstatement on the Bayonne City police force on the theory that the act creating the city board of commissioners which had terminated his employment had subsequently been declared unconstitutional. Plaintiff's discharge from the police force was upheld on the theory that whenever a statute creates an office and provides for an officer to carry out its functions, the acts of such officer must have the force of law notwithstanding a constitutional defect in the enabling legislation:

> * * * A statute which creates an office and provides an officer to perform its duties must have the force of law until condemned as unconstitutional by the courts, and that in the meantime the officer so provided is an officer *de facto,* that it is impliedly recognized and acted on, almost universally (so far as my examination has disclosed), in the case of municipal corporations which have been created by unconstitutional laws. * * * (74 N. J. L. at 462)

See also, *State* v. *Pillo,* 15 N. J. 99 (1954), *cert. den.* 348 U. S. 858, 75 S. Ct. 78, 99 L. Ed. 673 (1954)

[1-4] While the doctrine enunciated in *Lang* and *Pillo* may well be applicable to those acts performed by judges of the Municipal Court of Ocean Grove prior to the challenge to its jurisdiction in this case, we do not think that it has applicability here since the jurisdictional issue has been directly raised in these proceedings which involve the charges against defendant. Nor do we agree with the State's argument that the failure of defendant to raise the defense of lack of jurisdiction or the unconstitutionality of the statute in the municipal court amounted to a waiver of those defenses. The trial judge concluded that there was no waiver by virtue of R. 3:10-2 to 4. While we disagree with his reasoning in this respect, we agree that there has been no waiver. It has always been the better practice for an inferior court to assume that an act is constitutional until it has been passed upon by an appellate court. The municipal court is an inferior court and it is not ordinarily within its purview to deal with debatable questions relating to the constitutionality of statutes, especially those of long standing. See *Legg* v. *Passaic Cty.,* 122 N. J. L. 100, 104 (Sup. Ct. 1939), aff'd o. b., 123

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N. J. L. 263 (1939) We think that the constitutional challenge to jurisdiction was properly raised by defendant in the County Court at the trial *de novo*.

We find the issue in this case to be controlled by the opinion of our Supreme Court in *Schaad* v. *Ocean Grove Camp Meeting Ass'n*, 72 N. J. 237 (1977), decided after the County Court's decision herein. In *Schaad* the court held that the statutes giving municipal police powers to camp meeting associations did not violate the Establishment Clauses of the United States and New Jersey Constitutions because a primary or principal effect of those statutes was not to advance religion but rather to create a mechanism for basic local regulation of the camp meeting community:

> * * * Examined in the light of the history of the birth and early development of Ocean Grove, it will be evident that the statutes had the "secular legislative purpose" of giving the governing body of the camp meeting association the authority to adopt regulations for the good order, proper physical development and general health and welfare of the new community. These purposes are not a whit less secular in nature than if they had been given to a conventional municipal governing body. By the same token, the "principal or primary effect" of the enabling legislation will be found to be parallel to its "secular purpose." The powers given, as will be observed, were the rudimentary police powers which any community had to be vouchsafed, especially a new one in an isolated area sprung up from unimproved lands in the 1870's, to prevent disorder, lay out streets, provide for sewage and

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> other health facilities, regulate and license tradesmen, etc. None of these powers, as enumerated in the enabling legislation, had or have *any* effect toward advancing or inhibiting religion, much less a "principal or primary effect" in either of those directions.
>
> * * *
>
> * * * The instant statutes, whose plain purpose and effect are to regulate the general health, safety and welfare of the camp meeting association and its tenants, have, to the contrary, only the remotest functional connection, if any, with religion. * * * "[O]nce it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."
>
> * * *
>
> We now pass to consideration of the third of the three *Lemon* criteria: whether the questioned legislation fosters "an excessive government entanglement with religion." * * * (72 N. J. at 253, 262)

The issue resolved in *Schaad* involved the validity in establishment terms of the structure of the local government of Ocean Grove, and not a question of the validity, in establishment or other terms, of any particular regulation adopted by the governing body of Ocean Grove, such as the Sunday Closing Law which gave rise to the controversy.

Schaad would be dispositive of this case were it not for a reservation expressed by the court in its opinion with respect to it:

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> * * * We here take no position on the strict holding in *Celmer* that the legislative vesting of power to establish a municipal court in camp meeting associations of religious origin is in violation of the Establishment clause. Such a power was not contained in the 19th century police power legislation under scrutiny here but was granted by the amendment of N.J.S.A. 40:97-4 contained in P.L. 1953, c. 37, § 274. The power to create a court, granted by this latter-day amendment, may well be distinguishable from the subject matter of the original legislation in the light of the rationale, developed later herein, for sustaining the validity of the earlier statutes. (at 252, fn. 5)

Our research into the matter leads us to the conclusion that there is no real historical difference between the grant of authority by the Legislature in L. 1953, c. 37, § 274, to establish a municipal court in Ocean Grove and the original grant of 19th Century police powers by the New Jersey Legislature.

At present the Ocean Grove Municipal Court exercises its authority in the community of Ocean Grove under N.J.S.A. 40:99-1, as amended by L. 1953, c. 37, § 276. However, the existence of a local court in Ocean Grove actually predates the 1953 amendment by some 77 years.

Ocean Grove originally established a local municipal court under the authority of a police justice pursuant to L. 1876, c. 149, § 2 (Rev. 1877, § 36; C. S. p. 355, § 2; R.S. 40:99-2) which was repealed by L. 1953, c. 37, § 277. The 1876 act, entitled "An act for the better preservation of the peace upon the premises of camp meeting associations," read in pertinent part:

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> 1. * * * it shall be lawful for the Governor, on the application in writing of the Board of Trustees of any camp meeting association * * * to commission one or more persons whom such trustees shall designate and request, not exceeding six in number as peace officers, for the purpose of keeping order on the camp grounds and premises of such incorporated associations aforesaid, which officers shall have, when on duty, the same power, authority and immunity which Constables and other peace officers under the laws of this State possess and enjoy, * * *.
>
> 2. * * * that one of the said officers so designated, shall be especially commissioned as aforesaid for each or any one of said associations so as to possess within the limits of its property aforesaid, all the powers and jurisdiction in criminal cases which police justices now or hereafter may be authorized to exercise within any town or city in this State, or for the enforcement of the act in the preceding section mentioned, or of any other act tending to the preservation of order.

Pursuant to that legislative grant of authority, Ocean Grove applied for the appointment of six peace officers, one of whom received a commission as the police justice.[1] As police justice the appointee was entitled to exercise the same authority as other police justices of the State. Under L. 1883, c. 137, §4, subsections I, II and III, police justices were permitted to exercise power, authority and jur-

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[1] Centennial by the Sea, Seventh Annual Report of the President of the Ocean Grove Camp Meeting Asso'n, Published by Order of the Association 1876, p. 15.

isdiction over criminal matters and complaints arising in the municipality for which they were appointed. Their respective powers were stated to be the same as the justices of the peace for the several counties of the State. A police justice had power to hear, try and determine such criminal matters and complaints, and was authorized to hold court within the municipality for which he was appointed. He was also authorized to hear, try and determine all offenses charged before him by complaint in writing on oath or affirmation, to have been committed in violation of any by-law or ordinance of the municipality of his appointment for which the punishment was by fine or imprisonment. Every police justice court was a court of record and was vested with all powers usually exercised by courts of record in this State. Ocean Grove maintained such a court for 77 years.[2]

The police justice courts were constituted and established as municipal courts of their respective municipalities and designated as municipal courts under L. 1948, c. 264, § 15 (N.J.S.A. 2A:8-2). The transition from police court to municipal court was actually in name only. The Municipal Court of Ocean Grove was continued in its authority exercising its powers pursuant to N.J.S.A. 2A:8-1 *et seq.* and N.J.S.A. 40:97-4, and continues in the exercise of those powers to date. It is therefore readily seen that the police justice court which exercised its jurisdiction in Ocean Grove for those many years is not historically distinguishable from any other police courts established early in the judicial history of our State. The Ocean Grove Municipal

[2] Within that period, Ocean Grove was privileged to have such a distinguished member of the bar as later Justice Proctor presiding as a Police Justice.

Court has existed almost contemporaneously with the governing body established in 1870 and declared valid by the Supreme Court in *Schaad.*

While the Supreme Court indicated in *Schaad,* without deciding, that the power to create a municipal court, granted by a latter-day amendment, might well be distinguishable from the subject matter of the original legislation, we conclude that no distinction can be made. We find it difficult, if not virtually impossible, to differentiate between the exercise of legislative power by the governing body of Ocean Grove held to be valid in *Schaad,* and the exercise of that same power by the governing body in creating a municipal court.

As in *Schaad,* the issue before us here involves the validity in establishment terms of the constitution and existence of the Municipal Court of Ocean Grove, and not the validity of any particular ordinance or by-law adopted by the governing body of the community. We need not speculate, therefore, on the question of the validity of the enforcement in Ocean Grove Municipal Court of local by-laws and ordinances adopted by the board of trustees under the powers granted to it under, *e. g.,* N.J.S.A. 40:95-2, 3 and 4, since we are here concerned with the enforcement of state statutes prescribing motor vehicle operation, a jurisdiction granted to all municipal courts by the Legislature under N.J.S.A. 2A:8-21.

[5] Accordingly, for the reasons fully set forth in the majority opinion in *Schaad* v. *Ocean Grove Camp Meeting Ass'n,* 72 N. J. 237 (1977), we are constrained to conclude that the trial judge erroneously decided that the Municipal Court of Ocean Grove was unconstitutionally created. Defendant's conviction for violation of N.J.S.A.

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39:4-50(a) is reinstated and the cause remanded to the Monmouth County Court for the imposition of an appropriate sentence. As noted, defendant was originally convicted in the municipal court for violations of N.J.S.A. 39:4-81 and 98. The County Court judge acquitted defendant of those offenses ostensibly because he was satisfied that the State had not proven them, although the transcript seems to indicate that he dismissed the charges because he found that they merged into the drunk driving conviction. Since the State has not raised the issue of merger or acquittal on this appeal, we do not pass on that holding.

The judgment of the County Court acquitting defendant of the charges under N.J.S.A. 39:4-50(a) is reversed and the cause remanded to the Monmouth County Court for sentencing. We do not retain jurisdiction.

APPENDIX D

Opinion of the Monmouth County Court

MONMOUTH COUNTY COURT

M.C.C. Appeal No. A4236-75

July 12, 1976.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

LOUIS J. CELMER, JR.,

Defendant-Appellant.

SHEBELL, J. C. C. On March 24, 1976 defendant was charged in three summonses, returnable before the Ocean Grove Municipal Court, with operating a motor vehicle while under the influence of alcohol (N.J.S.A. 39:4-50(a)); speeding (N.J.S.A. 39:4-98) and disregard of a traffic signal (N.J.S.A. 39:4-81). On May 3, 1976 the municipal court judge found defendant guilty of all three offenses. Notice of appeal was filed with this court on May 11, 1976. Report of the convictions was filed with the Monmouth County Clerk on May 25, 1976 bearing the caption "Municipal Court of the Town of Ocean Grove, County of Monmouth, State of New Jersey."

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On June 11, 1976, at the trial *de novo* on the record below, defendant for the first time raised the issue of lack of jurisdiction of the municipal court. Defendant argues that N.J.S.A. 40:97-1 *et seq.*, enacted to grant powers to Camp Meeting Associations to act with the same powers as a municipality, including the power to establish a municipal court, is unconstitutional.

Decision on the constitutional arguments was reserved. The court made findings as to the sufficiency of the proofs with respect to the three charges and declared that the guilt of defendant had been proved beyond a reasonable doubt as to driving while under the influence of alcohol but that the other two charges had not been proven. Defendant was ordered to comply with R. 4:28-4, giving notice to the Attorney General of the State of New Jersey and also to the Ocean Grove Municipal Court, the attorneys for Ocean Grove, and to the Ocean Grove Camp Meeting Association of the United Methodist Church and its Police Chief. No one other than the Prosecutor of Monmouth County and the attorney for defendant has appeared.

R. 7:4-2(e) carries over to the municipal court practice the provisions of R. 3:10-3 and 3:10-4. The State argues that by not raising the defense of lack of jurisdiction or the unconstitutionality of the statute at an earlier time, it is waived. There is no merit to this position. R. 3:10-3 specifically permits the raising of such a defense on appeal. The prohibition of the aforementioned rules and R. 3:10-2 excepts from its mandate as to motions which must be raised before trial that of lack of jurisdiction. Even with respect to those defenses which must be raised before trial, the court is given authority for good cause

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shown to grant relief from the waiver of the defense for failure to raise it before trial.

L. 1870, c. 157 incorporated Ocean Grove, establishing the original incorporators and their successors as a body corporate and politic under the name of "The Ocean Grove Camp Meeting Association of the Methodist Episcopal Church." The name was later changed to "The Ocean Grove Camp Meeting Association of the United Methodist Church." L. 1968, c. 231. The purpose stated in L. 1870, c. 157, § 1 is for "providing and maintaining for the members and friends of the Methodist Episcopal Church a proper, convenient and desirable permanent camp meeting ground and christian seaside resort." The charter and the by-laws of the Association require that the trustees be and remain members of the United Methodist Church in good and regular standing. Association By-Laws, Arts. I, II and III.

The board of trustees manage and govern the Association under the charter and by-laws. The by-laws, which are subject to revision only by the trustees provide that the board is self-perpetuating in that they themselves elect their replacements and successors. All officers are elected from the trustees. There is no requirement that the trustees reside in Ocean Grove at any time. The land which forms the area known as Ocean Grove is owned by the Camp Meeting Association and is subdivided into lots which may be leased "for ninety-nine years or less, subject to renewal if none of the conditions have been violated, to parties who may be vouched for as of good moral character and in sympathy with the objects of this Association, when approved by the President or his designated representative in writing, subject to such rules and regulations as may be adopted by the Association or the Executive Committee from time to time." By-Laws, Art. XI.

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This Camp Meeting Association and any other which can qualify under N.J.S.A. 40:97-1 as being "incorporated under the laws of this state for the purpose of providing any religious body or society with a permanent camp meeting ground or place of religious service," is granted general powers which have been held to establish Camp Meeting Associations as a class of municipalities. *Percello* v. *Ocean Grove,* 100 N. J. L. 407, 408 (E. & A. 1924) N.J.S.A. 40:97-1 *et seq.* ratifies the powers of the trustees of such associations to adopt by-laws and extends their powers to the passage of ordinances and resolutions. N.J.S.A. 40:97-5. The trustees may set "penalties for violations" of such rules, regulations, by-laws, ordinances and resolutions, which shall have "the force and effect of laws" and which "shall be enforceable in the same manner and in the same courts as municipal ordinances." N.J.S.A. 40:97-6 to 8.

Express authority is given to the trustees under N.J.S.A. 40:97-4 to establish by ordinance a municipal court with the same functions, powers and duties that may be given to municipalities by law. The Ocean Grove Camp Meeting Association, by ordinance adopted April 17, 1964, established the municipal court as it now exists. The ordinance provides that the magistrate of the court, to be known as the "Municipal Court of Ocean Grove," shall be appointed by the board of trustees for a term of three years and until his successor is appointed and qualified. The ordinance provides for the hours when the court shall sit and also the place where court will be held.

Defendant contends that the statutes granting to Camp Meeting Associations powers to govern as a municipality, and particularly granting the powers of law enforcement and authority to establish a court, are unconstitutional as

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violating the First Amendment of the United States Constitution as it commands that there should be "no law respecting an establishment of religion."

This objection must be viewed at this time with due regard to the development of the tests outlined by the United States Supreme Court in recent years. It will no longer suffice to merely reflect on the long standing support the enactments have enjoyed when reviewed in the distant past by our earlier state courts. See *Percello* v. *Ocean Grove, supra,* 100 N. J. L. at 408-409.

In *Lemon* v. *Kurtzman,* 403 U. S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971), the court said as to the three tests to be applied in determining whether a law does not violate the First Amendment:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U. S. 236, 243, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz* [v. *Tax Commission,* 397 U. S. 664] at 674, 90 S. Ct. [1409] at 1414 [25 L. Ed. 2d 697 (1970)] [at 612-613, 91 S. Ct. at 2111]

[1] N.J.S.A. 40:97-1 *et seq.,* by giving to a religious association and each of its by-laws, rules, regulations, resolutions and ordinances the full force and effect of law, establishes a government by a religious organization which can govern not only its members but also any person who might find himself within its boundaries. The board of trustees has full power to govern all within their juris-

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diction. The trustees are elected by the baord as successors to the original incorporators and neither the general members of the association nor the residents of Ocean Grove take part in the election of those who govern Ocean Grove or appoint the Ocean Grove Municipal judge.

Ocean Grove governs the general population within its territory because of the authority given it by the State of New Jersey, and as a municipality Ocean Grove and its municipal court are in every sense fully involved and entangled with the government of this State. It looks to the State for its origin, continuance and affirmance of its powers. Thus, if the Ocean Grove Camp Meeting Association is to be equated with religion, then the violation of the third test, as outlined in *Lemon, supra,* is established.

The Ocean Grove charter specifically stated the religious purpose of the Association and required that the trustees be and remain church members in good and regular standing. L. 1870, c. 157, §§ 1 and 4. This purpose and requirement has continued to the present day, both through that same charter and also the by-laws of the Association.

N.J.S.A. 40:97-1 clearly limits the grant of municipal authority to those camp meeting associations which are incorporated for religious purposes. If a camp meeting association were established by any other body or society without being religious in orientation, it would not qualify for the general powers granted by N.J.S.A. 40:97-1 *et seq.* The third test of *Lemon* v. *Kurtzman, supra,* 403 U. S. at 612-613, 91 S. Ct. 2105, is violated as well as the first and second tests. Any secular legislative purpose N.J.S.A. 40:97-1 *et seq.* might have had has been overshadowed by the religious requirement mandated by its own terms. One of its principal effects is of necessity the advancing of religion.

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[2, 3] Whenever unconstitutional provisions appear within a statute, a court has a duty to excise them if there is no reason to believe that a portion thus eliminated constituted an essential motive in the enactment of the statute. The question is whether it clearly appears that the unconstitutional feature of the statute did not constitute an essential motive in its enactment. *McCran* v. *Ocean Grove,* 96 N. J. L. 158, 164 (E. & A. 1921). The statute in question, however, cannot be saved by merely excising the limitation of the act to camp meeting associations that are of a religious nature. Unless those associations of a religious nature were expressly prohibited from having such powers, the same prohibited entanglement would still exist between religion and government in those situations where the camp meeting association was of a religious body or society. If one were to excise from the act the municipal powers granted to such associations, that would emasculate the act to such an extent that it would be defeating its purpose. The constitutional defects in the act are so inherent to its purpose and the motive of the Legislature in enacting it that any such alteration would put the court in the place of the Legislature.

The statute giving camp meeting associations the authority to establish a municipal court is unconstitutional as a violation of the First Amendment of the United States and therefore the ordinance establishing the court is invalid and void *ab initio.*

The Municipal Court of Ocean Grove, not being lawfully established, is without jurisdiction. The charge in question being a motor vehicle violation and not having been filed with a court of competent jurisdiction within 30 days of the offense would be defective. N.J.S.A. 39:5-3.

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The entry of judgment of acquittal on the charge of driving while under the influence of alcohol will be withheld to allow the State an opportunity to appeal the decision on the jurisdictional and constitutional questions presented. If no appeal is taken within the period allowed, judgment of acquittal will be entered at the expiration of the 45 days. Defendant is found not guilty of violations of N.J.S.A. 39:4-81 at 39:4-98.

APPENDIX E

Order Dismissing Petition for Rehearing

SUPREME COURT OF NEW JERSEY

M-1202 SEPTEMBER TERM 1978

STATE OF NEW JERSEY,

Plaintiff-Respondent,

and

OCEAN GROVE CAMP MEETING ASSOCIATION, etc.,

Intervenor-Movant,

vs.

LOUIS J. CELMER, JR.,

Defendant-Respondent.

ORDER

No member of the Court having moved, the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 10th day of July, 1979.

STEPHEN W. TOWNSEND
Clerk

APPENDIX F

Conviction

(Filed—May 25, 1976)

MUNICIPAL COURT OF THE TOWN OF OCEAN GROVE
COUNTY OF MONMOUTH
STATE OF NEW JERSEY

STATE OF NEW JERSEY,

vs.

LOUIS J. CELMER, JR.,

Defendant.

CONVICTION

(Statutory or Common Law Offense)

Upon the complaint of Ptl. John Pollinger and the plea of the defendant that he was not guilty, and after trial had in this court, the defendant was convicted of the offense of drunken driving, speeding and disregard of a traffic signal.

JOHN R. ILLEGIBLE
County Clerk

(describe the offense for which the defendant was convicted):

in that the said defendant on the 24th day of March 1976, in the Town of Ocean Grove in Monmouth County, New Jersey, did operate a motor vehicle while under the influence of intoxicating liquor, did travel 76 miles per hour in a 30 mile per hour zone and did disregard a traffic signal on South Main Street, Ocean Grove, N.J.

(state essential facts constituting the offense for which the defendant was convicted; add statutory or ordinance reference).

The following witnesses were duly sworn and testified:

For the State: Ptl. Richard Cuttrell, O.G. Police Dept.; Ptl. John Pollinger O.G. Police Dept.

The court having afforded the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment, and no sufficient cause to the contrary appearing:

THEREUPON and after due consideration, it is on this Third day of May 1976.

ORDERED AND ADJUDGED that the defendant is guilty of the said offense as charged in the complaint and is convicted thereof and is sentenced to 39:4-50A—a fine of $200.00, costs in the amount of $10.00, N.J. driver's license revoked for a period of two (2) years; 39:4-81, fine of $10.00, suspended no costs, 39:4-98—fine of $25.00 costs in the amount of $5.00.

JAMES R. LAIRD
Judge

APPENDIX G

Order for Judgment

(Filed—July 14, 1976)

MONMOUTH COUNTY COURT

APPEAL No. 185-75

STATE OF NEW JERSEY,

Respondent,

vs.

LOUIS J. CELMER, JR.,

Defendant-Appellant.

ORDER FOR JUDGMENT

This matter being opened to the Court by the attorney for defendant, Louis J. Celmer, Jr., on appeal from convictions in the Ocean Grove Municipal Court charging the defendant with operating a motor vehicle while under the influence of alcohol contrary to N.J.S.A. 39:4-50A; speeding contrary to N.J.S.A. 39:4-98 and disregard of a traffic signal contrary to N.J.S.A. 39:4-81 and Thomas Primavera, Esq. appearing for James M. Coleman, Jr., Prosecutor of Monmouth County, and the matter having been heard as a trial de novo on June 11, 1976 and being

reargued on July 2, 1976, and a written opinion having been issued in this matter on July 12, 1976;

IT IS on this 14th day of July, 1976

ORDERED that judgment of acquittal be entered in favor of defendant as to charges of violating N.J.S.A. 39:4-31 and N.J.S.A. 39:4-33;

IT IS FURTHER ORDERED that the Ocean Grove Municipal Court lacks jurisdiction and is not a lawfully established municipal court and judgment of acquittal will be entered in favor of the defendant on the charge of violation of N.J.S.A. 39:4-50A at the expiration of forty-five (45) days from the date of the within Order unless appeal is taken within that period as to the jurisdictional determination of this court.

THOMAS F. SHEBELL, JR.
J.C.C.

I hereby consent to the
form of the within Order.

JAMES M. COLEMAN, JR.
Prosecutor of Monmouth County

APPENDIX H

Notice of Appeal

(Filed—July 26, 1976)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—APP. No. 185-75

CRIMINAL ACTION

STATE OF NEW JERSEY,

Plaintiff-Appellant,

vs.

LOUIS CELMER, JR.,

Defendant-Respondent.

NOTICE OF APPEAL

PLEASE TAKE NOTICE THAT the State of New Jersey, James M. Coleman, Jr., Monmouth County Prosecutor, Freehold, New Jersey, pursuant to *Rule* 2:3-1(b)(1), appeals to the Superior Court of New Jersey, Appellate Division, from the decision holding that the Ocean Grove Municipal Court lacks jurisdiction and is not a lawfully

established municipal court, issued by the Honorable Thomas F. Shebell, Jr., J.C.C. on July 14, 1976.

JAMES M. COLEMAN, JR.
Monmouth County Prosecutor
By: THOMAS E. PRIMAVERA
Assistant Prosecutor

The undersigned certifies that the requirements of *Rule* 2:5-3(a) have been complied with by ordering the requisite number of transcripts from Vernon O. Paulson and Daniel Ilaria, Court Reporters on July 19, 1975.

The trial court and defendant-respondent have been served pursuant to *Rule* 2:5-1(a) and (b).

THOMAS PRIMAVERA
Assistant Prosecutor